Supreme Court of the United States.

No. 89. OCTOBER TERM, 1899.

THE HANCOCK NATIONAL BANK, PLAINTIFF IN ERROR.

v.

JONATHAN W. FARNUM.

BRIEF OF PLAINTIFF IN ERROR.

THIS case comes to this court on a writ of error to the Supreme Court of the State of Rhode Island. That court sustained the demurrer of the defendant in error to the declaration of the plaintiff in error.

STATEMENT OF THE CASE.

The declaration sets out the following facts: The plaintiff is a creditor of the Commonwealth Loan and Trust Company; the Commonwealth Loan and Trust Company is a corporation duly organized under the laws of the State of Kansas and is not a railway, religious or charitable corporation; the defendant is a stockholder in that corporation; the plaintiff obtained judgment against the Commonwealth Loan and Trust Company in the Circuit Court of the United States for the District of Kansas on the eighth day of December, A.D. 1893, for $16,136.76, and execution issued thereafter on the twenty-seventh day of April, A.D. 1894, and was duly returned wholly unsatisfied.

The declaration also sets out, Article XII., section 2, of the Constitution of the State of Kansas as follows: "Dues from corporations shall be secured by individual liability of the

stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; and such individual liability shall not apply to railroad corporations nor corporations for religious or charitable purposes."

It also sets out paragraph 1192 of the General Statutes of Kansas of 1889 as follows: "If any execution shall have been issued against the property or effects of a corporation (except a railway or a religious or charitable corporation), and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of the stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The declaration further sets out that the stockholder's liability, created under paragraph 1192, has been interpreted by the Supreme Court of the State of Kansas, which is the highest court of that State, as follows: It is a contractual liability which arises upon the contract of subscription to the capital stock of said corporation, made by the defendant in becoming a stockholder. The defendant, in subscribing to said stock and becoming a stockholder, thereby guaranteed payment to the creditors of said corporation of an amount of the debt of said corporation equal to the par value of the stock held and owned by him. This amount is payable to the judgment creditors of said corporation who first pursue the remedy under said paragraph 1192 against the defendant until this amount has been paid by him; this liability is several, and an action to enforce the same is transitory and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder.

The declaration also sets out that the plaintiff has brought no action and recovered no judgment which in any event will reduce the amount unpaid on its execution below one thousand dollars.

Finally, the declaration sets out that this statute of the State of Kansas, as construed by the highest court of that State as above averred, imposes a liability upon the defendant to the plaintiff, and that full faith and credit should be given in the State of Rhode Island and the courts thereof to said public acts, records and judicial proceedings of the State of Kansas, and to the judicial construction of such laws, acts and records, by the Supreme Court of the State of Kansas, as required by Article IV., section 1, of the Constitution of the United States, and by section 905 of the Revised Statutes of the United States.

The defendant demurs to the plaintiff's declaration, and for grounds of demurrer says: —

1. The declaration does not set out the statutes of the State of Kansas under which it is claimed that the defendant is liable.

2. The cause of action set out in the declaration arises upon liabilities created by the statutes of the State of Kansas which will not be enforced by this court.

3. The declaration is insufficient and informal in other respects.

This demurrer was sustained by the Supreme Court of the State of Rhode Island, and the plaintiff in error assigns the following errors in the decision of that court (Record, pp. 14, 15): —

1. That in said suit there was drawn in question the construction of a statute of the United States, to wit, section 905 of the Revised Statutes of the United States, and the decision was against the title, right, privilege and immunity of the plaintiff in error specially set up and claimed under such statutes, to wit, said section 905 of the Revised Statutes of the United States.

2. That in said suit there was brought in question the Constitution of the United States, to wit, Article IV., section 1, of the Constitution of the United States, and the decision was against the title, right, privilege and immunity of the plaintiff in error specially set up and claimed under the Constitution, to

wit, said Article IV., section 1, of the Constitution of the United States.

3. That the State Court of Rhode Island decided, against the contention of the plaintiff in error, that it would not give full faith and credit to paragraph 1192 of the General Statutes of the State of Kansas, and to the judicial construction thereof by the highest courts of said State, as required by Article IV., section 1, of the Constitution of the United States, and by section 905 of the Revised Statutes of the United States, although their attention was drawn thereto, and thereby defeated the right of the plaintiff in error to enforce by appropriate action its claim against the said Farnum as aforesaid.

4. That the Supreme Court of Rhode Island decided, against the contention of the plaintiff in error, that it would not give full faith and credit to the judicial proceedings of the Circuit Court of the United States of America for the District of Kansas, as set forth in the pleadings, as required by Article IV., section 1, of the Constitution of the United States, and by section 905 of the Revised Statutes of the United States, although their attention was drawn thereto, and thereby defeated the right of the plaintiff in error to enforce by appropriate action its claim against said Farnum as aforesaid.

5. The Supreme Court of the State of Rhode Island erred in the decision rendered in this case in failing to give full faith and credit to the laws and constitution of the State of Kansas which were presented in the pleadings, in failing to give full faith and credit to the judicial construction of such laws by the highest court of the State of Kansas, and in failing to give full faith and credit to the judicial proceedings of the Circuit Court of the United States of America for the district of Kansas as set forth in the pleadings.

Points and Authorities.

The plaintiff in error claims jurisdiction in this case upon two grounds: *First*, because the Supreme Court of Rhode Island refused to give full faith and credit to the "public acts" of the State of Kansas as interpreted by the highest court of that State,

which were pleaded and made a part of the record. *Second*, because the Supreme Court of Rhode Island refused to give full faith and credit to the "judicial proceedings" of the Circuit Court of the United States for the District of Kansas.

I.

Public Acts.

First, Second and Third Assignments of Error.

The plaintiff in error submits that if paragraph 1192 of the General Statutes of Kansas and Article XII., section 2, of the Constitution of that State are necessarily involved in the decision of this case, then they must be given the same force and effect in the courts of Rhode Island that they have by law and usage at home.

This question was raised directly in the case of —

Chicago Railroad *v.* Wiggins Ferry Co., 119 U.S. 615.

That case was brought to this court from the Supreme Court of the State of Missouri, and the claim was made that the latter court had not given full faith and credit to the public acts of Illinois.

Mr. Chief Justice Waite says (p. 622): —

"The railroad company set up in its answer, as a defence to the action, that it had no authority to make the contract sued on, and in support of this defence put in evidence its Illinois Acts of Incorporation. Without doubt, the constitutional requirement (Article IV., section 1), that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,' implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813, in Mills *v.* Duryee, 7 Cranch, 481, and steadily adhered to ever since. The claim of the railroad company is that by law and usage in Illinois the operative effect of its

charter in that State is to make such a contract as that now sued on *ultra vires*."

"Whenever it becomes necessary under this requirement of the Constitution for a court of one State, in order to give faith and credit to a public act of another State, to ascertain what effect it has in that State, the law of that State must be proved as a fact."

(page 623): "Whether the charter of this company, in its operation on the contract now in suit, had any different effect in Illinois from what it would have, according to the principles of general law which govern like charters and like contracts, in Missouri and elsewhere throughout the country, was, under this rule, a question of fact in the Missouri court, to which no testimony whatever was offered."

(page 624): "It must somehow be made to appear on the face of the record that the facts as they were actually presented for adjudication made it necessary for the court to consider and give effect to the act of incorporation in view of some peculiar jurisprudence of Illinois rather than the general law of the land. That, as we have seen, was not done in this case. Consequently we have no jurisdiction, and the motion to dismiss is granted."

This court has considered this question with reference to the Insolvency Laws of Massachusetts, when raised in the courts of New York, regarding title to a ship on the high seas.

Crapo *v.* Kelly, 16 Wall. 610.

Mr. Justice HUNT (p. 621) says:—

"Without reference to whether Crapo was right or wrong, whether the question was *res integra* or *res adjudicata*, the fact that he claimed title under the Massachusetts record, and that his claim was overruled, gives the court jurisdiction of the present case."

This court has also so held with reference to the attachment laws of Illinois when their effect was in issue in the courts of New York.

Green *v.* Van Buskirk, 5 Wall. 312.

Same *v.* Same, 7 Wall. 139.

See Hervey *v.* R.I. Locomotive Works, 93 U.S. 664, 671.

Mr. Justice Davis in the second decision (p. 145) says: —

"The Supreme Court of New York necessarily decided what effect the attachment proceedings in Illinois had by law and usage in that State; and as it decided against the effect which Green claimed for them, this court had jurisdiction, etc."

See also —

Darby *v.* Mayer, 10 Wheat. 465:

This claim of jurisdiction was made in the following two cases: —

Lloyd *v.* Matthews, 155 U.S. 222.
Glenn *v.* Garth, 147 U.S. 360, 369, 370.

In each of these cases the record failed to show, as a matter of fact, what the law of the other State was, or what its interpretation was by the courts of that State.

The original purpose of Article IV., section 1, of the Constitution has been stated as follows: "Mr. Wilson and Dr. Johnson supposed the meaning to be, that judgments in one State should be the ground of actions in other States; and that acts of the legislatures should be included for the sake of acts of insolvency, etc."

Vol. 5 Elliot's Debates, p. 488, Edition of 1861 (Lippincott).

Acts of insolvency are given the same effect with respect to non-residents, in other States, under the Constitution, that they have by law and usage at home.

Cole *v.* Cunningham, 133 U.S. 107, 114.
Clay *v.* Smith, 3 Pet. 411.
Haggerty *v.* Amory, 7 Allen, 458.
Betts *v.* Bagley, 12 Pick. 572.

Certainly, acts of incorporation are of as great importance as acts of insolvency. Now that the creation of immense corporations doing business and having stockholders throughout all the States has become an every-day occurrence, it is of the highest importance that the obligations assumed by the stockholders shall be enforced against them wherever they reside, if legally possible. The plaintiff maintains that in every instance the character of the liability imposed by the charter and corporation acts of the State creating the corporation must be considered. Where, as under the laws of Kansas, a liability is imposed upon all who become stockholders, which is interpreted by the courts of Kansas to be contractual in its nature, arising upon the contract of subscription to the capital stock, and enforcible against stockholders severally, and transitory and not special in its remedy, it must be enforced in the courts of any State where personal service can be made upon the stockholder. It is a matter of contract. The stockholders, in taking their stock, submitted themselves to such a liability, enforcible in each jurisdiction by the appropriate action for enforcing a contractual liability against an individual.

The law of the State of Kansas is matter of fact in the courts of Rhode Island and must be alleged and proved.

"The question of what is the law of Massachusetts is a question of fact to be decided on evidence, and on such a question we can have no better evidence than the decisions of the highest judicial court of the State."

Per curiam, in Horton *v.* Reed, 13 R.I. 366.
Bartlett *v.* Dodge, 16 R.I. 740, 743.
O'Reilly *v.* Railroad, 16 R.I. 388, 389, 391.
Westgate *v.* Healy, 4 R.I. 523.

All the allegations of the law of Kansas set out in the declaration are admitted to be true as matters of fact by the defendant's demurrer.

Hanley *v.* Donaghue, 116 U.S. 1.
Lloyd *v.* Matthews, 155 U.S. 222.

The demurrer admits that the defendant is a stockholder in a Kansas corporation, and that all stockholders in such corporations are liable severally to judgment creditors of the corporation under paragraph 1192 of the General Statutes of Kansas and Article XII., section 2, of the Constitution of that State. The interpretation of those public acts is thereby necessarily involved, and is fully set out in the record. Article IV., section 1, of the Constitution of the United States requires that they be given the same force and effect in the courts of Rhode Island that they have by law and usage in Kansas. The plaintiff claims a right under the constitution and statutes of the State of Kansas, presented in the record, which was overruled by the Supreme Court of the State of Rhode Island. This court has jurisdiction of such a case.

II.

Judicial Proceedings.

First, Fourth and Fifth Assignments of Error.

The plaintiff in error submits as the second ground of jurisdiction that the Supreme Court of Rhode Island failed to give full faith and credit to the judicial proceedings of the Circuit Court of the United States for the District of Kansas as set forth in the pleadings.

Sections 905 and 709 of the Revised Statutes of the United States have uniformly been held to require that a State court give due effect to the judgment of a United States Court when presented in the record and necessarily involved.

Embry *v.* Palmer, 107 U.S. 3, 9.
Dupasseur *v.* Rochereau, 21 Wall. 130, 134.
Crescent Live Stock Co. *v.* Butchers' Union, 120 U.S. 141, 146, 147.
Pittsburg R.R. *v.* Long Island Trust Co., 172 U.S. 493.

The judgment obtained by the plaintiff in error against the Commonwealth Loan and Trust Company, with the return of execution wholly unsatisfied, as set out in the declaration, has the effect of establishing a *prima facie* cause of action against all who are admitted stockholders at that time.

Howell *v.* Manglesdorf, 33 Kansas, 194.
Van de Mark *v.* Barons, 52 Kansas, 779. (*Not* Bemark *v.* Barrows, as in Exhibit "C," Record, p. 7.)

The case of Grund *v.* Tucker, 5 Kansas, 70, referred to in Howell *v.* Manglesdorf, holds further that judgment against the corporation is conclusive upon the stockholder as to the amount and validity of the creditor's claim against the corporation.

That is the general doctrine.

Hawkins *v.* Glenn, 131 U.S. 319.
Warrington *v.* Ball, 90 Fed. Rep. 464.
Dexter *v.* Edmands, 89 Fed. Rep. 467.
Am. Mortgage Co. *v.* Woodworth, 79 Fed. Rep. 951.
MacVickar *v.* Jones, 70 Fed. Rep, 754.
Thayer *v.* Lithograph Co., 108 Mass. 523, 528.
Milliken *v.* Whitehouse, 41 Maine, 527.
Guerney *v.* Moore, 131 Mo. 650.

See also —

Penniman, Petitioner, 11 R.I. 333, 337.
National Bank *v.* Angell, 18 R.I. 1.

This doctrine is reaffirmed by the Supreme Court of Kansas in a decision rendered after this suit was brought.

Ball *v.* Reese, 58 Kansas, 614.

The judgment against the corporation in the Federal Court for the District of Kansas has the effect in Kansas of creating an obligation on the part of each stockholder to pay in satisfaction thereof the full par value of the stock owned by him at the time of the return of execution. An alleged stockholder has the right to come into court and deny that he is a stockholder, or prove that he has paid the amount of his liability, or plead the statute of limitations; but the judgment against the corporation stands, and upon the return of *nulla bona* on the execution is the evidence that the stockholder's liability has accrued. Such a judgment and execution constitute a cause of action against the stockholders severally.

If this court is to go behind the averments of the declaration and consult the Kansas decisions referred to in Exhibit "C" (p. 7), the plaintiff in error submits that those cases interpret the liability under paragraph 1192 as follows: —

The liability is contractual.

Howell *v.* Manglesdorf, 33 Kansas, 194, 199.
Abbey *v.* Dry Goods Co., 44 Kansas, 415, 418.
Abbey *v.* Long, 44 Kansas, 688, 691.
Plumb *v.* Bank, 48 Kansas, 484.
Achenbach *v.* Pomeroy Coal Co., 2 Kans. App. 357, 359; 42 Pac. Rep. 734.

The liability is several and not joint.

Abbey *v.* Dry Goods Co., 44 Kans. 415.
Bank *v.* Magnusson, 57 Kans. 573. (*Not* 52 Kansas.)

The liability accrues upon the return of execution unsatisfied on a judgment against a corporation.

Howell *v.* Manglesdorf, 33 Kans. 194.
Van de Mark *v.* Barons, 52 Kans. 779.

The liability runs directly to the creditors and not to the corporation.

Abbey *v.* Dry Goods Co., 44 Kans. 415, 418 (citing Cook, Stock and Stockholders, 1st Ed., sect. 216).
Abbey *v.* Long, 44 Kans. 688.

The liability is transitory and is not a special remedy.

Howell *v.* Manglesdorf, 33 Kans. 194, 199.
Approved in Wilson *v.* Seligman, 144 U.S. 41, 47.

Such a liability can be enforced in any jurisdiction with the same force and effect as in Kansas. The stockholders assented in their contract of subscription to such a liability to be enforced in such an action.

The United States Court of Appeals for the Third Circuit has held that such a judgment must be given its full force and effect against a stockholder in Pennsylvania.

Warrington *v.* Ball, 90 Fed. Rep. 464.

See also —

Hale *v.* Hardon, 95 Fed. Rep. 747, 760.

The Court of Appeals of Maryland has so decided upon the same question under the Virginia statute.

Glenn *v.* Williams, 60 Md. 93, 112, 115.

Cited with great approval in —

Hawkins *v.* Glenn, 131 U.S. 319, 330.
Glenn *v.* Liggett, 135 U.S. 533, 534.

To the same effect, see —

Lehman *v.* Glenn. 87 Ala. 618.
Mut. Fire Ins. Co. *v.* Phœnix Co., 108 Mich. 170.
Parker *v.* Stoughton Mill Co., 91 Wis. 174.
Hancock Bank v. Ellis, 166 Mass. pp. 418.

"When Congress gave the effect of a record to the judgment it gave all the collateral consequences."

Mr. Justice STORY in Mills *v.* Duryee, 7 Cranch, 481, 484.

"It must be obvious, when the Constitution declares that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and provides that Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof, that the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgment upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another State" (p. 324). "When, therefore, this court said in Mills *v.* Duryee, 7 Cranch, 481, 'If it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel* record,' this language does not admit of the interpretation that a plea not denying the judgment, but which resists it upon the ground of a release, payment, or a presumption of payment, from the lapse of time, whether such presumption be raised by the common law prescription or by a statute of limitation, may not be pleaded" (p. 326).

Mr. Justice WAYNE in McElmoyle *v.* Cohen, 13 Pet. 312, 324, 326.

The judgment in one State that an action has been barred by the statute of limitations of that State, when properly pleaded in an action on the same claim in another State, will be given full faith and credit and constitute a complete defence.

Weeks *v.* Harriman, 65 N.H. 91.
Sweet *v.* Brackley, 53 Maine, 346.
Wernse *v.* McPike, 100 Mo. 476.
FREEMAN on Judgments, 4th Ed., section 575.
RENO on Non-Residents, section 308.

So, also, a judgment, even after reversal, may be a complete defence in a suit for malicious prosecution.

"Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every form where it is legitimately produced as the foundation of an action, or of a defence, either by plea or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate; and even after reversal it still remains — as in the case of every other judgment or decree in like circumstances — sufficient evidence in favor of the plaintiff who instituted the suit or action in which it is rendered, when sued for a malicious prosecution, that he had probable cause for his proceeding."

> Mr. Justice MATTHEWS in Crescent Live Stock Co. *v.* Butchers' Union, 120 U.S. 141, 157, 158.

It has always been held by this court that a decree, ordering an assessment upon the stockholders of a corporation for the collection of unpaid subscriptions to the capital stock, is binding upon all the stockholders, although they were not parties to the suit.

> Great Western Telegraph Co. *v.* Purdy, 162 U.S. 329, 337.
> Glenn *v.* Marbury, 145 U.S. 499.
> Glenn *v.* Liggett, 135 U.S. 533.
> Hawkins *v.* Glenn, 131 U.S. 319.

"A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

> Mr. Chief Justice FULLER in Hawkins *v.* Glenn, 131 U.S. 319, 329.

Such a decree is conclusive upon the stockholders as to the necessity and amount of the assessment.

"The order of assessment, whether made by the directors, as provided in the contract of subscription, or by the court as the successor in this respect of the directors, was doubtless, unless directly attacked and set aside by appropriate judicial proceedings, conclusive evidence of the necessity for making such an assessment, and to that extent bound every stockholder, without personal notice to him."

Mr. Justice GRAY in Great Western Telegraph Co. *v.* Purdy, 162 U.S. 329, 336, 337.

An alleged stockholder is still at liberty to deny that he is a stockholder and to make special defences.

"The whole effect of the order of assessment being to fix the amount which any stockholder liable under his contract of subscription should pay, and to authorize the receiver to bring suits against stockholders for the same, but not to determine whether the present defendant, or any other particular stockholder was liable for anything, the Iowa Court, by sustaining the defence of the statute of limitations, did not deny to the judicial proceeding of Illinois the full faith and credit to which it was entitled."

Mr. Justice GRAY in Great Western Telegraph Co. *v.* Purdy, 162 U.S. 329, 337.

See also —

Pittsburg Railroad *v.* Long Island Trust Co., 172 U.S. 493, and cases cited.
Huntington *v.* Attrill, 146 U.S. 657, 666, 686.
Carpenter *v.* Strange, 141 U.S. 87.
Cole *v.* Cunningham, 133 U.S. 107.
Embry *v.* Palmer, 107 U.S. 3.
Insurance Co. *v.* Harris, 97 U.S. 331.

There seems to be no valid distinction between the effect of such an order for an assessment, and the effect under the Kansas laws of a judgment against the corporation with the return of execution unsatisfied. The judgment is conclusive upon the stockholder as to the validity and amount of the creditor's cause of action against the corporation. Upon the return of *nulla bona* it becomes a cause of action against each stockholder for an amount not exceeding the par value of his stock.

Hale *v.* Hardon, 95 Fed. Rep. 747, 759.
Hanson *v.* Davison, 76 No. W. Rep. 254, 256 (Minn.).
Holland *v.* Development Co., 65 Minn. 324, 329–331.
2 Morawetz, Corporations, sec. 886.

The judgment in the present record is admitted by the demurrer to be valid. The defendant admits that he is a stockholder. The defendant cannot deny that judgment, but can only resist it on the ground of special defences such as payment or the statute of limitations. This is its effect in the jurisdiction where it was rendered.

Inasmuch as the Supreme Court of Rhode Island refused to give this effect or any effect to the judicial proceedings of the Circuit Court of the United States for the District of Kansas as set forth in the declaration, this court has jurisdiction of this case.

III.

Liability is Contractual.

The Supreme Court of Rhode Island, in its opinion (Record, p. 9), says: "The declaration does not aver that the defendant has made a contract, nor that the law under which the corporation exists has made him a contracting party, but that an opinion of the Supreme Court of Kansas says that the relation between a stockholder and a corporation creditor is that of a contract."

That court further says (p. 10): "Assuming, however, that the opinion of the Supreme Court of Kansas is that the relation of a stockholder to creditors is contractual, it is not a binding opinion upon us; it is not a judgment to which full faith and credit must be given under the Federal Constitution, and, giving to it the high respect which is due to the court from which it comes, it still falls short of establishing, as a matter of pleading in this declaration, the fact of a contract by the defendant in Kansas by virtue of the statute." The Rhode Island Court here admits that the construction of the Kansas statute is necessarily involved in this case, and then holds that it will not give that statute the same force and effect which it has in Kansas.

The courts of Kansas have uniformly held the liability to be contractual.

"While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of a corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder."

Howell *v.* Manglesdorf, 33 Kans. 194, 199; 5 Pac. Rep. 702.

"The nature of this liability is peculiar. It seems to have been created for the exclusive benefit of corporate creditors. The liability rests upon the stockholders of a corporation to respond to the creditors for an amount equal to the stock held by each, and it has been held that an action to enforce this liability can only be maintained by the creditors themselves in their own right and for their own benefit. Cook on 'Law of Stock and Stockholders,' section 216."

Abbey *v.* Dry Goods Co., 44 Kans. 415, 418; 24 Pac. Rep. 427.

"The law says: You may combine your capital, create a corporation, relieve yourselves of the common law liability of copartners, and obtain the many other advantages growing out of corporate existence; but, as a protection to the public, in lieu of the partnership liability you escape, you shall be held not only liable to the corporation and creditors for the full

amount of your stock subscribed, but, to guarantee further protection to creditors of the corporation, you shall, if the corporation itself becomes insolvent, be charged with a further liability to such creditors equal to the amount of your stock in the corporation."

Abbey *v.* Long, 44 Kans. 638, 691; 24 Pac. Rep. 1112.

(The above citation from Abbey *v.* Long indicates that the stockholder's liability under the Kansas law is a liability retained by the State of Kansas for the benefit of creditors, in lieu of the partnership liability, when granting the corporation a charter.

Upon this point see —

Hawthorne *v.* Calef, 2 Wall. 10, 22.
Conant *v.* Van Schaick, 24 Barbour, 87.
N. E. Bank *v.* Stockholders, 6 R.I. 154, 188, 189.
Carrol *v.* Green, 92 U.S. 509, 513.
Marcy *v.* Clark, 17 Mass. 330, 334.
Hardy *v.* Manufacturing Co., 80 Va. 417.
Lowry *v.* Inman, 46 N.Y. 119.
Eames *v.* Savage, 77 Me. 219.)

"Under our Constitution and Statutes the individual liability stands as a sort of surety for the corporate liability, and creditors of the corporation are supposed to contract with reference to the individual responsibility of the stockholders."

Plumb *v.* Bank of Enterprise, 48 Kans. 484; 29 Pac. Rep. 700.

"The liability of a stockholder in an insolvent corporation is of the nature of a liability on contract, and survives against the legal representatives of a deceased stockholder. This liability may be determined by an ordinary action in a district court or established by proceedings in a probate court which has 'jurisdiction to consider and determine all demands against any estate.'"

Achenbach *v.* Pomeroy Coal Co., 2 Kans. App. 357, 359; 52 Pac. Rep. 734.

If the language of any of these decisions is in the nature of *dicta*, yet that would be controlling evidence of the judicial interpretation of the statute of Kansas in the absence of any decision to the contrary.

Laing *v.* Rigney, 160 U.S. 531, 542, 544.
Hackett *v.* Potter, 135 Mass. 349, 352.

The decisions of the Supreme Court of Rhode Island have uniformly recognized the contractual character of a stockholder's relation to a corporation.

"The provisions of the charter apply as to such debts the moment a person becomes a stockholder. The condition on which he holds stock, even before he contracted any debts to the bank, is that if he do become indebted his stock shall be liable."

COURT in Cross *v.* Phœnix Bank, 1 R.I. 39, 41.

"We think the intent of the section was to superadd the personal and individual liability of the stockholders to the corporate liability."

"The General Assembly acted upon the statement in the petition; and thus both parties to the contract — the stockholders on the one hand and the General Assembly on the other — affirm the construction which the court have put upon the charter."

"Upon the faith of this liability of the private property of the stockholders the bank has obtained credit, and the stockholders ought not now to be permitted to repudiate it."

GREEN, C. J., in Atwood *v.* Rhode Island Bank, 1 R.I. 376, 387.

"In other words, each thus contracted, not with the other, but with a corporation, existing but not yet organized, to take the number of shares of stock set opposite his name, provided responsible subscriptions to the amount of $175,000 could be

obtained; and when these were obtained, and the railroad company upon the faith of them proceeded to organize and to act, the subscription contract of each with the company became perfect and mutually binding both upon the subscribers and the company, as the respective parties to the contract."

AMES, C. J., in Diman *v.* Railroad, 5 R.I. 130, 135.

See also —

Atlantic Company *v.* Mason, 5 R.I. 463, 470.

"It is true that the common law visits no personal liability upon the members of a corporation aggregate for its contracts; but for this very reason the policy of this and other States and countries of the common law has, by express enactment, imposed such a liability in some form upon stockholders in incorporated trading and manufacturing companies, in order that the public may be secured against the consequences of the extravagant speculations, or even of the incautious enterprises of such bodies corporate."

"In the contingency, then, that a judgment creditor of the corporation can find no corporate property upon which to levy his execution, he is entitled to proceed against such stockholders as are liable for his debt, as joint contractors, or copartners."

AMES, C. J., in New England Bank *v.* Stockholders, 6 R.I. 154, 188, 189.

"There is no difference between the parties here or their counsel as to the *general* rule, that the obligation of a contract in favor of or against the corporation or corporators cannot be impaired, nor can a right under the provisions of the charter be discharged or defeated."

BRAYTON, C. J., in Gardner *v.* Hope Ins. Co., 9 R.I. 194, 200; (p. 201, citing Hawthorne *v.* Calef, 2 Wall. 10).

See also —

Slocum *v.* Providence Steam Co., 10 R.I. 112, 115.

"It is difficult to see how the new act violates any of the conditions laid down in this treatise. It does not in the least alter or diminish the liability, either of the corporation or of the stockholder on the contract."

POTTER, J., in Penniman, Petitioner, 11 R.I. 333, 346; (p. 343, citing Hawthorne *v.* Calef).

The stockholder's liability prescribed by the laws of Kansas is plainly not contrary to the policy of the State of Rhode Island.

Cases cited above.

General Laws, Rhode Island, 1896, chap. 180, sects. 1, 12, 22; chap. 178, sect. 9.

Public Statutes, Rhode Island, 1882, chap. 155, sects. 1, 12, 22; chap. 153, sect. 9.

General Statutes, Rhode Island, 1872, chap. 142; chap. 140.

So, also, foreign corporations are permitted to do business in Rhode Island under the laws of their creation.

"A foreign corporation doing business in this State has only such powers as have been conferred upon it by its charter or by the laws of the State to which it owes its existence; it gains no additional powers by doing business here, because this State does not give it any, but only allows it, as a matter of comity, to exercise such as it has."

Per curiam, Pierce *v.* Crompton, 13 R.I. 312, 313.

"A corporation can have but one legal residence, and that must be within the State or sovereignty creating it, although by comity it may be allowed to do business through its officers and agents in other jurisdictions."

TILLINGHAST, J., in Ireland *v.* Globe Milling Co., 19 R.I. 180, 184.

It seems clear from these citations that the law of the sovereignty creating a corporation governs that corporation and all its members. The defendant, in becoming a stockholder in the Commonwealth Loan and Trust Company, took his shares subject to the liabilities imposed by the State of Kansas.

The Supreme Court of Rhode Island, in giving its decision (Record, p. 11), purported to rely on an earlier decision in Sayles *v.* Bates, 15 R.I. 342. That case holds as follows (pp. 345, 346): "One of the defendants is a married woman and was such when she became a stockholder. She demurs, denying her liability on the ground that the liability is predicated on contract, and, being a married woman, she was incapable of contracting. We do not think this view is tenable. The liability is a statutory liability, and as such is incident to the ownership of the stock. If a married woman is capable of becoming a stockholder, which is not questioned, she becomes subject to the liability by force of the statute, not by contract, when she becomes a stockholder. *In re* Reciprocity Bank, 22 N.Y. 9."

Upon whatever theory married women are allowed to become stockholders, it is clear that they are held subject to a stockholder's liability, not because there is no contract, but because the statute imposing the stockholder's liability supersedes the common law in that particular, and makes them liable in spite of their common law incapacity to contract.

"It is said that *femes covert* are not liable to suit or judgment at the common law; and, in general, this is true. It is also true that the apportionment of liability amongst stockholders in banks, when duly confirmed, becomes a judgment against each stockholder to be enforced by execution, as in other cases. But it was competent for the legislature to depart from the rules and

analogies of the common law, and to make married women and their estates liable in this proceeding, as other shareholders in banks are made liable."

COMSTOCK, C. J., In the Matter of Reciprocity Bank, 22 N.Y. 9, 15, 16.

This is the doctrine generally.

1 COOK, Stock and Stockholders, 4th Ed., 1898, section 250, and cases cited.

The Supreme Court of the United States is not bound by the interpretation by the Supreme Court of Rhode Island of paragraph 1192 of the General Statutes of Kansas, or of the character of the relations between a stockholder in a Kansas corporation and that corporation and its creditors.

"When the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment on it has not been given due faith and credit in the courts of another State, . . . this Court must decide for itself the true construction of the statute."

Mr. Justice GRAY in Scott *v.* McNeal, 154 U.S. 34, 45.
Huntington *v.* Attrill, 146 U.S. 657, 683, 684.
Douglas *v.* Kentucky, 168 U.S. 488, 502.
McCullough *v.* Virginia, 172 U.S. 102.
Pittsburg Railroad *v.* Long Island Trust Co., 172 U.S. 493.
Great West. Tel. Co. v. Purdy, 162 U. S. fr. 335.

According to the above cases this doctrine applies to questions arising under Article IV., section 1, of the Constitution, as well as under Article I., section 10, or the Fourteenth Amendment.

This court has always held the relations of a stockholder to the corporation and its creditors to be contractual.

Dartmouth College *v.* Woodward, 4 Wheat. 518.
Pearsall *v.* Railroad, 161 U.S. 646, 660.
Carrol *v.* Green, 92 U.S. 505, 513.
Richmond *v.* Irons, 121 U.S. 27, 56.
Hawkins *v.* Glenn, 131 U.S. 319, 332.
Stuart *v.* Hayden, 169 U.S. 1, 8.

A stockholder's liability, such as is set out in the declaration, is a contract within the meaning of Article I., section 10, of the Constitution, forbidding any State to pass any "law impairing the obligation of contracts."

Hawthorne *v.* Calef, 2 Wall. 10.
Terry *v.* Anderson, 95 U.S. 633.

"A corporation of one country may be excluded from business in another country (Paul *v.* Virginia, 8 Wall. 168), but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the cor-

poration must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony."

Mr. Chief Justice WAITE in Canada Railroad *v.* Gebhard, 109 U.S. 527, 537, 538.

"It may be admitted that any State may, by its laws, require, as a condition precedent to the right of a corporation to be organized or to transact business within its territory, that it shall appoint an agent there on whom process may be served; or even that every stockholder in the corporation shall appoint an agent upon whom, or designate a domicile at which, service may be made within the State, and that, upon his failure to make such appointment or designation, the service may be made upon a certain public officer, and that judgment rendered against the corporation after such service shall bind the stockholders, whether within or without the State. In such cases, the service is held binding because the corporation or the stockholders, or both, as the case may be, must be taken to have consented that such service within the State shall be sufficient and binding; and no individual is bound by the proceedings who is not a stockholder. Lafayette Ins. Co. *v.* French, 18 How. 404: *ex parte* Schollenberger, 96 U.S. 369; Pennoyer *v.* Neff, 95 U.S. 714, 735; Vallee *v.* Dumergue, 4 Exch. 290, 303; Copin *v.* Adamson, L. R. 9 Exch. 345, 355, 356, and 1 Ex. D. 17."

Mr. Justice GRAY in Wilson *v.* Seligman, 144 U.S. 41, 45.

The foregoing case of Wilson *v.* Seligman is a decision upon the Missouri Statute from which the Kansas Statute was in part copied. Paragraph 1192 of the Kansas Statutes is practically the same as the Missouri Statute, with the addition of the following clause: "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." This clause provides a remedy against non-resident stockholders.

"This ruling does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another State and upon whom service cannot be obtained here. While

the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder."

JOHNSTONE, J., in Howell *v.* Manglesdorf, 33 Kans. 194, 199.

This is the interpretation, by the highest court of Kansas, that "action" in this clause of paragraph 1192 does not mean a special remedy peculiar to that court, but an appropriate action in any jurisdiction for enforcing a contractual liability against an individual.

In the light of such a statutory provision thus interpreted by the Supreme Court of Kansas, the plaintiff in error contends that the defendant, as a stockholder, must be taken to have consented that an appropriate action for enforcing a contractual liability may be brought against him in the courts of Rhode Island by any judgment creditor of the corporation.

This court has already decided that a liability like that set out in the plaintiff's declaration is a cause of action in a Federal Court.

Flash *v.* Conn., 109 U.S. 371.

"The right of the plaintiffs to sue upon this liability in any court having jurisdiction of the subject-matter and the parties is, therefore, clear. Dennick *v.* Railroad, 103 U.S. 11."

Mr. Justice WOODS in Flash *v.* Conn., p. 379.

The Kansas liability is certainly not penal.

Huntington *v.* Attrill, 146 U.S. 657.

"As the statute was not penal, it is not important whether the liability is called statutory or one based upon contract. It is statutory because it did not exist at common law; and it is contractual because 'every one who becomes a member of the company by subscribing to its stock assumes this liability.' (Flash *v.* Conn., *supra*.)"

SHIPMAN, J., in Whitman *v.* Bank of Oxford, 83 Fed. Rep. 288, 294 (N.Y.); 51 U.S. App. 536, 582.

"Undoubtedly the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

Mr. Justice SHIRAS in National Bank *v.* Hawkins, 174 U.S. 364, 372.

The plaintiff in error does not maintain that every statutory liability imposed upon stockholders in corporations can be enforced in other States than that creating the corporation. The liability imposed by the laws of Ohio, for instance, requires proceedings in equity, drawing before the court all the stockholders, all the creditors and the corporation itself, for the liquidation of the affairs of the corporation. This can be done only in the jurisdiction where the corporation was organized. Giving this liability the same force and effect in other jurisdictions that it has in Ohio, leads to the same result, — that the liability can be enforced only in Ohio.

"Somewhat anomalous and arbitrary remedies, like that existing in the Constitution and Statutes of the State of Kansas, have been upheld and enforced in Federal Courts, largely upon the ground that the stockholder submitted himself to the operation of the remedy and contracted with the public in respect to it. It could, perhaps, be said with consistency that creditors, on the other hand, who deal with a corporation and voluntarily

contract, are bound by the disabilities and conditions prescribed by the government creating the corporation; and Railway Co. *v.* Gebhard, 109 U.S. 527, 537, would seem to justify the position that creditors and members of the public who deal with a corporation are bound by the remedy and the liability prescribed, together with the disabilities, if any, under the laws of the State creating the corporation and prescribing the remedy.

"If, therefore, there is a lack of efficiency in the remedy prescribed by the statute of Ohio (a question which is not necessary we should decide), it would seem, upon reason, that the rule which would hold the stockholder to an arbitrary and anomalous remedy, on the ground of contract, should hold the creditor to an inefficient and practically inoperative remedy upon the same ground."

ALDRICH, J., State Bank *v.* Sayward, 91 Fed. Rep. 443, 446 (Mass. C. C. A.).

See also —

Post *v.* Toledo Railroad, 144 Mass. 341.
Rice *v.* Hosiery Co., 56 N.H. 114.
Aultman's Appeal, 98 Pa. St. 505.

A similar liability was that prescribed by the statutes of New Hampshire.

Erickson *v.* Nesmith, 15 Gray, 221.
Same *v.* Same, 4 Allen, 223.
Same *v.* Same, 46 N.H. 371.
Hadley *v.* Russell, 40 N.H. 109.

The plaintiff claims upon the foregoing authorities that the defendant, in becoming a stockholder in a Kansas corporation, submitted himself to the liability under paragraph 1192, prescribed by the laws of Kansas, as interpreted by the courts of that State. It was a part of his contract that the action prescribed by the last clause of paragraph 1192, and interpreted in

Howell *v.* Manglesdorf, to be enforcible in any jurisdiction where personal service could be made upon the stockholder, might be brought against him in the courts of Rhode Island to enforce that liability. He agreed that this should be the effect of a judgment against the corporation in Kansas with a return of *nulla bona* on the execution. This constituted a contract in which the interpretation of paragraph 1192 was necessarily involved, as also the effect of the judicial proceedings in the Circuit Court of the United States for the District of Kansas. That public act and those judicial proceedings were entitled to the same force and effect in Rhode Island that they had in Kansas. This was denied them. The judgment of the Supreme Court of Rhode Island should therefore be reversed.

IV.

Decisions in other Jurisdictions.

The declaration in this case was modelled on a declaration which had previously been held to state a good cause of action by the Supreme Court of Massachusetts.

Hancock Nat. Bank *v.* Ellis, 166 Mass. 414.

A similar declaration has been sustained on demurrer in the following cases, approving Hancock Bank *v.* Ellis.

Bell *v.* Farwell, 176 Ill. 489.
Western Nat. Bank *v.* Lawrence, 76 N.W. Rep. 105 (Mich.).

In the decision of Hancock Bank *v.* Ellis, the court declined to look into the Kansas decisions, although they were annexed to the declaration, as in this case, but decided on the averments

of the declaration. That court has, however, passed upon the merits of the case and decided to enforce the liability.

Hancock Bank *v.* Ellis, 172 Mass. 39.

This liability has been enforced in other States in the following decisions: —

Ferguson *v.* Sherman, 116 Calif. 169.
Guerney *v.* Moore, 131 Mo. 650.

See also —

Cushing *v.* Perot, 175 Pa. St. 66, 73.
Tuttle *v.* Bank, 161 Ill. 497 (dissenting opinion).
But compare Bell *v.* Farwell, *supra*.

In New York a demurrer was sustained to a declaration setting out the statutes of Kansas, but not the judicial interpretation of them.

"The complaint contains no allegation as to the meaning or effect of these statutes, or of the provision of the Constitution quoted under the adjudications of the courts of Kansas, nor any allegation that any judgment has been obtained against the defendant in the courts of that State upon his liability as a stockholder, under these provisions of the local law. We are, therefore, obliged to construe them ourselves."

O'Brien, J., in Marshall *v.* Sherman, 148 N.Y. 9, 17.

In the Federal Courts this liability has been universally enforced:

In the Circuit Courts of Appeals;

Rhodes *v.* Bank, 66 Fed. Rep. 512 (Ill.).
Whitman *v.* Bank of Oxford, 83 Fed. Rep. 288 (N.Y.).
Warrington *v.* Ball, 90 Fed. Rep. 464 (Pa.).

See also —

State Bank *v.* Sayward, 91 Fed. Rep. 443 (Mass.).
Auer *v.* Lombard, 72 Fed. Rep. 209 (Mass.).
Hale *v.* Hardon, 95 Fed. Rep. 747 (Mass.).

In the Circuit Courts;

Bank *v.* Rindge, 57 Fed. Rep. 279 (Calif.).
McVickar *v.* Jones, 70 Fed. Rep. 754 (N.H.).
Bank *v.* Whitman, 76 Fed. Rep. 697 (N.Y.).
Amer. Mortgage Co. *v.* Woodworth, 79 Fed. Rep. 951 (N.Y.); s.c. 82 Fed. Rep. 269.
R.I. Mortgage Co. *v.* Moulton, 82 Fed. Rep. 979 (Ill.).
Schiffer *v.* Columbia College, 87 Fed. Rep. 166 (N.Y.).
Mechanics Bank *v.* Fidelity Ins. Co., 87 Fed. Rep. 113 (Pa.); s.c. 91 Fed. Rep. 456.
Brown *v.* Trail, 89 Fed. Rep. 641 (Md.).
Dexter *v.* Edmands, 89 Fed. Rep. 467 (Mass.).
Bank v. Richter, 46 Fed. Rep. 70. (N.J.)

Summary.

In conclusion, the claim of the plaintiff in error is as follows: The defendant admits by his demurrer that he is a stockholder in the Commonwealth Loan and Trust Company, a Kansas corporation which is not a railway, charitable or religious corporation. As such stockholder he is held by law to have taken his stock, subject in all respects to the laws of the jurisdiction creating the corporation, and to contract with reference to those laws. Those laws are set out in the declaration as matters of fact, and are admitted by the demurrer. They are, therefore, necessarily involved in the decision of this case. The judicial proceedings of the United States Circuit Court for the District of Kansas are also well pleaded and their effect is stated in the declaration. Those proceedings constitute a complete cause of action against the defendant as a stockholder.

These public acts of Kansas and judicial proceedings of the Federal Court of that district are entitled to full faith and credit in the courts of Rhode Island under sections 709 and 905 of the Revised Statutes of the United States, and Article IV., section 1, of the Constitution. They have not been given the same effect by the Court of Rhode Island that they have in Kansas, or, in fact, any effect whatever. This court, therefore, has jurisdiction of the case to enforce the right claimed by the plaintiff in error under the Statutes and Constitution of the United States. This court, in taking jurisdiction, will determine for itself what effect the judicial proceedings declared on have in the State of Kansas, and what effect is there given to the public acts of that State here involved. The plaintiff in error maintains that this court, under all the authorities and upon settled principles of law, can come to but one conclusion, namely, that the public acts and judicial proceedings set out in the record have the effect claimed for them by the plaintiff in error. They constitute a liability, contractual in its nature, transitory and several. The declaration states a complete cause of action against the defendant. Therefore, the judgment of the Supreme Court of Rhode Island should be reversed.

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Attorneys for Plaintiff in Error.

No. 89.
Sup. Ct. Brf. of Jaquith for T. C.

FILED
DEC 19 1899
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.
Filed Dec. 19, 1899.

No. 89. OCTOBER TERM, 1899.

THE HANCOCK NATIONAL BANK, PLAINTIFF IN ERROR,

v.

JONATHAN W. FARNUM.

Supplemental Brief for Plaintiff in Error.

IN reply to the defendant's brief the plaintiff in error submits that the decisions of the Supreme Court of Kansas, interpreting paragraph 1192 of the Kansas Statutes, are the evidence of the effect which that paragraph has by law and usage in Kansas. It is not necessary that such decisions shall be made in this very proceeding, in order to be evidence of the law of Kansas.

Green *v.* Van Buskirk, 7 Wall. p. 146.
Laing *v.* Rigney, 160 U.S. 531.
Hanley *v.* Donoghue, 116 U.S. 1.

If the plaintiff in error is correct in the premise that the defendant is conclusively presumed to have taken his stock with reference to the laws of Kansas and the liabilities there prescribed, then the defendant is certainly bound by the interpretation of paragraph 1192 by the court of Kansas. Inasmuch

as the law of Kansas is a matter of fact in the courts of Rhode Island, it must be pleaded in order to state a cause of action. The failure to recognize this principle is the sufficient explanation of the following cases: —

Lloyd *v.* Mathews, 155 U.S. 222.
Glenn *v.* Garth, 147 U.S. 360.
Bank of North America *v.* Rindge, 154 Mass. 203.
Marshall *v.* Sherman, 148 N.Y. 9.
Tuttle *v.* Bank, 161 Ill. 497.

The defendant now claims that the plaintiff in error should have alleged in the declaration that it had recovered a judgment against the corporation in the courts of Rhode Island, and had execution issued and returned unsatisfied in that court.

The plaintiff in error would reply first, that this ground was not alleged in the defendant's demurrer, and is not open to the defendant at this time.

General Laws of Rhode Island, 1896, chap. 239, sect. 16: "Whenever a demurrer is filed, the same need not be more formally stated than that the party demurring demurs to such declaration or plea, but shall be accompanied with a statement of the specific grounds of demurrer; and no other grounds shall be considered under such demurrer than those so stated, unless for cause shown and on proper terms."

Third National Bank *v.* Angell, 18 R.I. 1, MATTESON, C. J. (p. 4): "The defendants also suggest that the declaration is bad because the judgment is stated only as inducement under a 'whereas,' and that a material fact such as the obtaining of the judgment, which is traversable, should be directly alleged. Doubtless the criticism is well founded, but the defect is merely a matter of form and not of substance. Formal defects can be taken advantage of only by special demurrer and not a general demurrer like the present."

The plaintiff in error further replies that such an averment is not necessary to support this action. The case of National Tube Works Company *v.* Ballou, 146 U.S. 517, cited on page 12 of the defendant's brief, is not in point. That is the case of a creditor's bill based upon the general equity jurisdiction of the United States Circuit Court for the Southern District of New York. As stated in the decision: "The principle invoked was that the plaintiff's remedy at law had not been exhausted by the issue and return of an execution on a foreign judgment"(p. 523). The court in that case relied upon the three following decisions: —

Claflin *v.* McDermott, 12 Fed. Rep. 375, in which Judge WALLACE says (p. 375): "Actions like the present, in aid of the execution at law, are ancillary to the original suit, and are, in effect, a continuance of the suit at law to obtain the fruit of the judgment or to remove obstacles to its enforcement" (p. 376). "It is therefore difficult to understand how such a suit can be maintained in any court which does not exercise an auxiliary jurisdiction over the court in which the original suit was brought."

Walser *v.* Seligman, 13 Fed. Rep. 415, in which the same judge says (p. 417): "There are numerous cases where creditors have been permitted to resort to equity in the first instance to enforce a statutory liability of stockholders; but these were cases where the statute authorized a direct action, and the question has generally been whether a court of law or of equity was the proper forum. These cases, of course, have no application here."

"Such judgments here are only contract debts, and do not authorize the exercise of auxiliary jurisdiction."

Tarbell *v.* Griggs, 3 Paige, 207, where the decision is based upon a statute of the State of New York, which requires the return of execution unsatisfied before bringing a creditor's bill.

The necessity of a judgment in the same forum by the plaintiff in a creditor's bill is based upon the fundamental principle

that a plaintiff alleging such a ground of equity jurisdiction must show plainly that he has no adequate remedy at law. The fact that he has judgment and an unsatisfied execution in another jurisdiction is no evidence that he has no adequate remedy at law in the jurisdiction where he brings his bill. Such an allegation in some form must be made.

But the plaintiff in error now before this court claims no equity jurisdiction, but brings an action at law under a statute of Kansas which prescribes a particular liability. In Walser *v.* Seligman, *supra*, Judge WALLACE said that this principle of a creditor's bill did not apply to such a case.

A creditor's bill is brought in behalf of all creditors.

Myers *v.* Fenn, 5 Wall. 205.

This action under the Kansas statute belongs to the diligent creditor who first moves against the stockholder. (Record, p. 6.)

The case of Rocky Mountain National Bank *v.* Bliss, 89 N.Y. 338, cited on page 17 of the defendant's brief, is an authority in support of the plaintiff in error. In that case the court was considering a stockholder's liability imposed by the statutes of New York. The decision went on two grounds. Judge RAPPALLO, after stating that a judgment against the corporation and unsatisfied execution was a condition precedent to a suit against the stockholder, says: "The proceeding against the company in Colorado was not a compliance with this condition. It was a proceeding *in rem*, which affected only the property there attached, and the execution issued was only against that specific property." That of itself was a conclusive ground for the decision.

He then uses the language quoted in the defendant's brief (p. 17), and adds what the defendant omitted: "The legal remedies afforded by the courts of this state, where the corpora-

tion was created and is domiciled, are those which the legislature must be deemed to have intended. Such is the construction given to a similar provision in respect to creditor's bills, and although the cases are not precisely the same, we think that they strongly confirm the view that when a statute of this state requires, as a condition precedent to further proceedings in its courts, that an execution against the property shall first have been issued, it means that such execution shall have been issued out of a court of this state of general jurisdiction."

It seems reasonable that the judgment and execution required by paragraph 1192 must be a judgment and execution in the courts of Kansas where the corporation was created and domiciled. In every case where this liability has been enforced, cited on pages 29 and 31 of the plaintiff's brief, it has been upon a judgment against the corporation in the state or federal courts of Kansas.

This very objection has been raised and overruled in the following cases: —

Thompson v. Pfeiffer 56 Pac. Repr. 763 (Kans.)
Ferguson *v.* Sherman, 116 Calif. 169, 174, 176.
McVickar *v.* Jones, 70 Fed. Rep. 754, 760.
Guerney *v.* Moore, 131 Mo. 650, 658.

In Hancock Bank *v.* Ellis, 172 Mass., page 47, Chief Justice Field says: "The present plaintiff has pursued exactly the remedy provided by paragraph 1192 of those statutes. That paragraph permits the plaintiff to proceed by action to charge the stockholders with the amount of the judgment. The courts of Kansas hold that the action must be against the stockholders severally and not jointly."

In an early decision in Missouri, Bagley *v.* Tyler, 43 Mo. Ap. 195–205, the court says: "The words of the statute are: 'If any execution shall have been issued' against the corporation and no property found, then the contingency has arisen whereby the

stockholder may be charged. It is not surely required that the creditor, before resorting to the stockholder's liability, should take a roving execution to go about the country wherever the corporation may have had business, and should, too, go into the courts of other states and secure judgment against the corporation with executions in all and returns of no property found. The stockholder contracted in view of this law, and he agreed that if a judgment should be rendered against the corporation, and execution returned thereon no property found, then he would pay the debt to the extent of his double liability."

That this is the true construction of paragraph 1192 there can be no doubt. In Howells *v.* Manglesdorf, 33 Kan., p. 196, the Supreme Court of Kansas says: "While the proceeding is summary in its character, and its maintenance contingent upon the insolvency of the corporation, or upon the rendition of a judgment against the corporation and the return of an execution thereon of *nulla bona*, yet we cannot regard it as an interlocutory or auxiliary proceeding in the action against the corporation. In the action against the corporation no notice of its pendency is given to the stockholder. He is not directly interested in the action, as his liability is only secondary to the corporation, and exists alone by reason of this statutory provision, and of that provision of the Constitution in pursuance of which the statute is enacted (Const., Art. 12, sect. 2). His liability to the creditors of the corporation is in the nature of a guaranty. The action or proceeding to enforce the same does not accrue until the execution upon the judgment against the principal is returned unsatisfied."

"We think that the proceeding against the stockholder, whatever remedy may be employed, is an independent one."

The present case is not an auxiliary proceeding ancillary to the judicial proceedings in the Federal Court of Kansas. It is an entirely independent proceeding founded upon paragraph 1192 of the Kansas statutes. The reasoning, therefore, which requires a judgment and unsatisfied execution in the same

jurisdiction in order to support a creditor's bill has no application to this statutory liability. The judgment of the United States Circuit Court for the District of Kansas is entitled to the same faith and credit, as evidence, in the court of Rhode Island that it would have in Kansas. Its effect as evidence there is conclusive as proof that the plaintiff is a creditor of the corporation, that it has recovered judgment, issued execution, and found no property, and thus that it has fulfilled the conditions of paragraph 1192 which gave it an independent cause of action against the defendant as an admitted stockholder. There can be no question that the statute was intended to impose a liability in a case like the present. Such is the wellnigh universal interpretation of the statute.

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